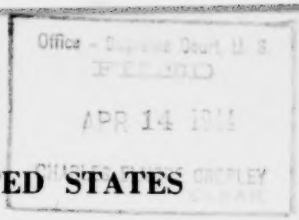

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

Number 888

■

CHARLES MILBURN CLAYTON
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

HAYDEN C. COVINGTON
Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

Number

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CHARLES MILBURN CLAYTON
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Thomas Howard Stull, presents this petition for writ of certiorari and shows unto the court as follows:

Summary of Matters Involved

1. Preliminary Statement.

The questions presented in this petition upon the issues raised in the trial court and in the court below have neither been decided nor foreclosed by the opinion and judgment of the court in the case of *Falbo* v. *United States,* 320 U. S. 549, 64 S. Ct. 346, as more fully appears in the statement, reasons relied upon for granting this petition for the writ,

and the accompanying brief filed separately herein supporting this petition. The Act and Regulations thereunder that require a registrant to report for induction as a condition precedent for obtaining judicial review of whether he is exempt from training and service under the Act are directly challenged here as being in direct violation of specific provisions of the Constitution. The issues presented are broader and stronger than those considered in the *Falbo* case. Additional issues are whether or not the petitioner is entitled to have submitted to the jury the question of his honest and good-faith belief that he was exempt from duty and not required to report for induction as bearing upon whether or not he "knowingly, unlawfully and feloniously" evaded his duty under the Act as requested in his requested charges. These requested charges were based on the authority of this court expressed in *United States* v. *Murdock*, 290 U. S. 389, 395-396.*

2. Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals is not yet reported in the *Federal Reporter* but it appears in the record certified and is printed as an appendix to this petition for writ of certiorari at page 27, infra.

3. Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. Timeliness of the Petition.

The judgment of the Circuit Court of Appeals was entered on March 17, 1944. The petition for writ of certiorari is filed within thirty days from the date of the entry of such judgment in said court.

* See Question number 15 of the Questions presented p. 6, infra, this petition.

5. Release of Petitioner Does Not Make Cause Moot.

In the court below the Government filed a motion to dismiss the appeal because it appeared that after the expiration of the ten days' sentence imposed the petitioner was released from custody. Petitioner did not elect to serve the sentence and attempted to obtain bail pending appeal, which was refused by the trial judge. Notice of appeal was served and filed immediately after imposition of the sentence. Since the conviction of petitioner was for a felony, the disabilities of attainder of citizenship rights continue after discharge from custody. The court below held the cause was not moot. (See the appendix, *infra* this petition, page 27. The petitioner presents other reasons why the cause is not moot. See infra pp. 25-26 of this petition.)

6. Statutes and Regulations Involved.

The Selective Training and Service Act of 1940, as amended, Sections 3 (a), 5 (d), 10 (a), 11 (50 U. S. C., Appendix ss. 301-318); and Selective Service Regulations 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 627.22, 633.1, 633.2, 633.21, 642.41, all of which regulations appear in 32 C. F. R. 1941 Supp., 601.7 et seq.

7. Constitutional Provisions Involved.

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

8. Questions Presented.

(1) Are the Act and Regulations, which have been construed so as to require a registrant who is exempt to report for induction as a condition precedent to judicial review and so as to penalize the exempt registrant who fails to respond to an illegal order by denying him the right to challenge the classification, void because constituting a bill

of attainder contrary to clause 3, Section 9 of Article I of the United States Constitution?

(2) Are the Act and Regulations thus construed void because denying to petitioner his right to a judicial trial, to urge his defense of no duty under the Act, to prove his innocence and to a jury trial, contrary to Article III, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution?

(3) Can the petitioner, in defense to the indictment, show that the proceedings of the Selective Service System and the order to report for induction were void because the agents of said System had violated the due process clause of the Fifth Amendment to the United States Constitution in arriving at his classification and in ordering him to report for induction when the undisputed evidence showed that he was exempt from all training and service under the Act?

(4) Does the trial court or the jury have the duty and right, upon the trial of an indictment charging an unlawful failure to report for induction, to consider and determine whether the draft boards violated the substantive rights of the petitioner as an exempt registrant contrary to the due process clause of the Fifth Amendment to the United States Constitution?

(5) Can the petitioner, in defense to the indictment, show that the proceedings of the Selective Service System and the order to report for induction were void because the agents of said System had violated the due process clause of the Fifth Amendment to the United States Constitution by denying him a hearing through failure to consider the undisputed evidence before the agency showing that he was exempt from all training and service?

(6) Does the trial court have the duty and right to permit petitioner to show that he was not guilty and that the indictment was void because it was based on an order of the boards made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to

law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations?

(7) Does the trial court have the duty and right to permit petitioner to show that he was not guilty and that the indictment was void because it was based on an order of the boards made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, over the objection and exception by petitioner that the exclusion of such evidence denied him his right to a judicial trial and a jury trial contrary to clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(8) Did the trial court err in excluding evidence offered by petitioner to show that he was not guilty and that the indictment was void because it was based upon an order of the board made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations?

(9) Did the trial court err in charging the jury that it could not consider the question of whether or not petitioner was exempt as a minister and whether or not the draft board had acted in an arbitrary and unconstitutional manner, and that the only question to be decided was whether or not the petitioner knowingly failed to report for induction over the objection of petitioner that he was denied his rights to a judicial trial and a jury trial contrary to

clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(10) Did the trial court commit error in refusing the requested instructions of the petitioner, all of which required the jury to consider and determine whether the draft board's order was void because the Selective Service System had violated the substantive rights of petitioner as an exempt registrant contrary to the due process clause of the Fifth Amendment to the United States Constitution?

(11) Since the records before the Selective Service System show that the petitioner was a duly recognized minister of religion under the Selective Training and Service Act and the Regulations thereunder, was he exempt from all training and service under the Act?

(12) Did the Selective Service System exceed its authority in classifying the petitioner as liable for training and service and in ordering the petitioner to report for induction in excess of the jurisdiction of said Selective Service System?

(13) Did the Selective Service System act arbitrarily and capriciously in classifying the petitioner as liable for training and service when there was no evidence to show that he was not a minister of religion as claimed and the findings of the agency were contrary to the evidence?

(14) Should judicial review of the action of the admintrative agency in ordering the petitioner to report be had by trial de novo in so far as it affects the classification of petitioner?

(15) Did the trial court commit error in refusing the requested instruction of petitioner requiring the jury to consider whether or not his honest good-faith belief that he was exempt as a minister of religion under the Act in determining whether or not the petitioner is guilty?

9. How the Issues Were Raised.

The issues were raised by the motion to quash (Ap. C. pp. 4-5); by rulings of the court excluding evidence (5-213);

by the motion for directed verdict at the close of all the evidence Ap. C. pp. 23-25 (192); exceptions to the court's charge Ap. C. pp. 31-37 (229-239); and by the requested instructions Ap. C. pp. 38-71 (241-292).

10. Statement of History of the Case and the Facts.

HISTORY

This criminal action was begun by an indictment[1] returned against Charles Milburn Clayton in the District Court of the United States for the Southern District of West Virginia, at Bluefield, charging Clayton with an alleged violation of the Selective Training and Service Act of 1940, as amended. It was alleged in the indictment that Clayton was a registrant under the Act subject to the jurisdiction of Local Board No. 3 of McDowell County, West Virginia. That he was classified by said board as liable for training and service under the Act and ordered to report for induction into the Armed Forces. That Clayton unlawfully and knowingly failed and neglected to perform a duty imposed upon him under the Act by failing to report for induction.

Before pleading to the indictment said petitioner duly filed and presented his motion to quash the indictment. In this motion it was alleged that the Selective Training and Service Act and the Regulations thereunder were unconstitutional. It was alleged that the Act and Regulations had been construed by the courts so as to require an exempt registrant to report for duty before permitting him to test the invalidity of the order for him to report for induction and to penalize him by denying him the right to show, in defense to the indictment, that the order to report was invalid because based on a void and illegal classification. The

[1] The indictment is set forth *en hæc verba* in the APPENDIX, which is printed separately. References to the APPENDIX in the Clayton case are shown thus, Ap. C. p. 1. That part of the indictment charging failure to keep the draft board advised as to address of registrant is not involved here because the court instructed the jury to return a verdict of not guilty on that count.

petitioner alleged that the Act and Regulations, as thus construed, were void because: (1) They constitute a bill of attainder, contrary to Clause 3 in Section 9 of Article One of the Constitution of the United States. (2) They surrender the judicial powers to the draft boards, contrary to Article Three of the Constitution. (3) Deny the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment. (4) Deny the right of a jury trial and the right to have the jury determine guilt or innocence, contrary to the Constitution and the Sixth Amendment. (5) Permit conviction without evidence of guilt and upon hearsay evidence and deny right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments.[2] This motion to quash was overruled and exception allowed to the petitioner.

Thereafter the petitioner pleaded *"not guilty"* and on January 24, 1944, the trial to a jury began before Hon. Ben Moore, United States District Judge. (28)[3] The evidence was concluded on Monday, January 24, 1944. (28-193) The cause was argued to the jury on Tuesday, January 25, 1944. (194-218) After the argument of counsel the court charged the jury. (219-228)[4] The petitioner duly objected and excepted to the charge of the court to the jury. (228-240)[5] The petitioner's requested charges were timely presented and refused, to which exceptions were allowed. (239-292)[6] The jury returned a verdict of *"guilty"*. (293-294)[7] On Wednesday, January 26, 1944, for good reasons expressed by the court, the petitioner was sentenced to only *ten days'* imprisonment and placed in the custody of the

[2] The motion is printed in full in the appendix. Ap. C. pp. 4-5.

[3] All figures hereafter appearing in *parentheses* refer to the stenographer's transcript of the proceedings and evidence in the respective cases made a part of the clerk's record.

[4] The charge of the court is printed in full. See Ap. C. pp. 25-30.

[5] The objections to the charge are printed in full. Ap. C. pp. 31-37.

[6] The requested charges are printed in full. See Ap. C. pp. 38-71.

[7] The verdict is printed in the appendix. See Ap. C. pp. 74-76.

Attorney General.[8] Charles Clayton duly appealed to the court below.

The petitioner duly filed his assignments of error. Thereafter a full transcript of the record, evidence and all proceedings was settled with the bill of exceptions upon the trial. The transcript and bill of exceptions were timely filed in the court below. The cause was duly submitted to the Circuit Court of Appeals for decision. Upon the foregoing it is submitted that this court has jurisdiction to entertain this petition for writ of certiorari.

FACTS RECEIVED AND REJECTED

Facts Received

Petitioner duly registered under the Act on December 23, 1942 (29), the date he arrived at draft age. (29) The local board mailed him a questionnaire on February 13, 1943 (29-30, 37). On February 18, 1943, the questionnaire properly filled out was filed with the local board. (30, 44) The questionnaire showed that he was a minister of religion since May 1, 1938 (42); that he had eight years of elementary school education and two years of high school training; that he had attended a school where he studied for the ministry. (38) He also advised the board that he was working at his job as a minister of religion and performing ministerial duties and that he had been doing this work for four years (38); and that the occupation for which he was best fitted was minister of religion. (40) He pointed out to the board that he was employed by the Watchtower Bible and Tract Society, Inc., 117 Adams Street, Brooklyn, New York. (39) Petitioner advised the board that he was a minister of Jehovah's witnesses and acting under the direction of the Watchtower Bible and Tract Society and that he had been formally ordained on May 1, 1938. (42) He filed with the board also affidavits, magazines and a certificate of ordination together with other documents proving his

[8] Statement of the trial judge on sentencing defendant is set forth in APPENDIX. Ap. C. pp. 74-76.

status as a minister, which were made a part of the questionnaire. (43) He claimed classification as an ordained minister and asked to be placed in class *IV-D*. (43)

On April 19, 1943, the local board classified him in Class 1-A and denied his claim for classification as a minister of religion. (30, 44) He requested a personal appearance. It was granted and the board denied his request for a change in classification. (30, 44) He thereupon appealed from this classification continuance which was made on April 29, 1943. (30, 44)[9] The appeal board affirmed the classification and denied him his claim for exemption as a minister of religion. (31, 33, 44)

July 15, 1943, the local board mailed petitioner a notice to report for induction on July 27, 1943. (33-34, 127-128) The petitioner failed to report for induction as requested (33-34) and the local board mailed to him a notice of suspected delinquency and again commanded the petitioner to report for induction on August 9, 1943. (34, 129-130) Petitioner failed to report as directed. (34-35)

Charles Clayton testified that he sincerely believed that the notice to report for induction was illegal and unlawful because he was exempt as a minister. (179) He said he believed the board should have classified him as a minister under the Act. (180) He testified that his youthfulness does not militate against his qualification to act as a minister. He cited cases in the Bible where youths have acted as ministers and disciples. (181-182) That his parents had brought him up to serve and fear the Lord. (182) That he had been brought up to be trained for the ministry and that he had been reading and studying the Bible as a part of this preparation since he could read after starting to elementary school. (183) He started reading the Watchtower publications several months before 1938. That he made a consecration to preach the Gospel and to be one of the witnesses for Almighty God as Christ Jesus and the prophets had been; and that he was ordained in the spring of 1938. (183) That

[9] See Ap. C. p. 16.

from such date to the spring of 1939 he acted as a part-time minister and continued an intensified special course of study training himself for the full-time preaching of the gospel, which he undertook in 1939. (184) That he was appointed a direct pioneer representative of the Watchtower Bible and Tract Society and assigned to a territory to call upon the people from house to house, just as Jesus and His apostles did. If he found anyone interested he would call back and conduct Bible studies in the homes of such interested persons. When these studies had increased to a sufficient number a congregation was organized. (184-185)

He also testified that his covenant with the Lord to preach put him in a position entirely different from one who is not a minister of the gospel and which forbade him from discontinuing the preaching of the gospel. He quoted the apostle Paul, who said: 'Yea, necessity is upon me, yet woe unto me if I preach not the gospel.' From the Bible he also quoted: "Take heed unto thyself and unto the doctrine; continue in them, for in doing so thou shalt both save thyself and them that hear thee." Clayton declared that it was a matter of life or death to him and to the people as to whether they would receive the message of the Lord which he carried. That since the government had decreed that the work performed by ministers of religion, of which he was one, was of national importance, because it upheld the spiritual welfare and morale of the people at this time and gave them something to look forward to, he did not consider that the law or the order to report for induction was valid since they did not apply to ministers of religion. (185-187)

EVIDENCE EXCLUDED

An Important Letter to the Department of Justice explaining the position of Jehovah's witnesses in reference to participation in war and their status as ministers published in the *Consolation* magazine, No. 551, October 30, 1941, and appearing at pages 24-30, which was filed with the

local board and made a part of the questionnaire was offered in evidence, excluded and marked as Defendant's Exhibit 2. (45-46)

Opinion No. 14, as amended November 2, 1942, issued by the National Director of the Selective Service System concerning the ministerial status of Jehovah's witnesses under the Act and Regulations published in the *Consolation* magazine, No. 611, February 17, 1943, and appearing at pages 13-15, which was filed with the local board and made a part of the questionnaire was offered in evidence, excluded and marked as Defendant's Exhibit 3. (45-46)

An affidavit of Raymond V. Franz, personally acquainted with petitioner, stating that petitioner had acted as a regular ordained minister of religion devoting his entire time to ministerial duties for three and one-half years from house to house, conducting Bible studies and preaching sermons before congregations; and that Clayton devoted approximately 175 hours per month to actual preaching to the people. This document was a part of the questionnaire and filed with the local board, was offered in evidence, excluded and marked as Defendant's Exhibit 4. (47)

A document signed by the President of the Watchtower Society was filed with the local board and made a part of the questionnaire showing that petitioner was an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and therefore one of Jehovah's witnesses; that he was sent forth by the Society, created and organized by law to preach the gospel of God's kingdom as commanded by God at Isaiah 61:1, 2; Isaiah 43:9-12; Matthew 10:7, 12; Matthew 24:14; Acts 20:20; 1 Peter 2:21 and 1 Corinthians 9:16; and that Jehovah's witnesses are compelled to obey God rather than man. (Acts 3:23; Acts 4:19; and Acts 5:29) That in obedience to God's commandments petitioner preached the gospel by calling upon the people at their homes and exhibiting to them the message of said gospel in printed form, and thus gave the people an opportunity to learn of God's gracious provision for

them. This document was offered in evidence, excluded and marked as Defendant's Exhibit 5. (48-51)

A certificate of ordination signed by the Superintendent of Evangelists of the Society was filed with the local board and made a part of the questionnaire showing that the records of the Society revealed that Clayton was ordained and baptized in 1938 and in 1939 was appointed a direct special representative of the Society to perform missionary and evangelistic service in organizing churches and generally preaching the Gospel of the Kingdom. That he had taken a course of study in the Bible and Bible helps prescribed by the Society and had shown himself apt to preach and teach "this Gospel of the Kingdom". (Matthew 24: 14) He is declared to be an ordained minister of the Gospel. This document was offered in evidence, excluded and marked as Defendant's Exhibit 5. (51-52)

Clayton also filed with the local board additional evidence which was his affidavit giving detailed facts of his training for activity as a minister, which was offered in evidence, excluded and marked as Defendant's Exhibit 5. (53-59)

Filed with the board and also excluded was the occupational questionnaire showing petitioner to be a minister of religion. It is Exhibit 6. (64-66) Petitioner's written request for a personal appearance was also excluded and marked Defendant's Exhibit 7. (67-68)

A letter from the local board to the State Director asking for information about classification of Jehovah's witnesses was excluded. (Defendant's Exhibit 8, 67-70)

The answer of the State Director advising the board to follow paragraph 5 of Opinion No. 14 in classifying the petitioner was excluded. (Defendant's Exhibit 9, 71-72)

The written statement of petitioner appealing his classification and giving evidence showing a violation of the Regulations by the board was excluded. (Defendant's Exhibit 10, 73-79)

A letter of the board transmitting petitioner's file to the

appeal board (Defendant's Exhibit 11, 80-81), another letter of the board detailing the history of petitioner's case and summarizing conclusions of fact (Defendant's Exhibit 12, 81-83), and another letter of transmittal (Defendant's Exhibit 13, 84) were excluded.

A letter from the petitioner to the board asking the board to forward his statement on appeal to the appeal board was excluded. (Defendant's Exhibit 14, 85)

The trial court also excluded a letter from the State Director inquiring whether petitioner was appealing as a minister or conscientious objector (Defendant's Exhibit 15, 86-87); also the letter of the local board pursuant to this direction to the registrant (Defendant's Exhibit 16, 88-90); and also the answer of the local board after complying with this request showing that petitioner claimed classification on appeal as a minister. (Defendant's Exhibit 17, 90-91)

Affidavits containing additional facts in proof of the ministry of petitioner were submitted to the Board of Appeal showing that petitioner had no secular occupation and was entitled to a classification of 4-D. These were all excluded. They were, Affidavit by Charles Clayton (Defendant's Exhibit 18, 92-94); Affidavit of Alva Cox (Defendant's Exhibit 19, 94-95); Affidavit of Charles Seders (Defendant's Exhibit 20, 95-96); Affidavit of James W. Johnson (Defendant's Exhibit 21, 96-97); Affidavit of A. K. Robinette (Defendant's Exhibit 22, 97-98); and Affidavit of Carl H. Hibshman (Defendant's Exhibit 23, 99-100).

A letter addressed to the State Director reciting the facts presented before the draft boards and requesting that an appeal be taken to the President (Defendant's Exhibit 24, 101-102); a similar letter to the National Director (Defendant's Exhibit 25, 103-109); and a letter from the State Director to the local board showing that no appeal would be taken (Defendant's Exhibit 26, 110), were all excluded from the evidence.

A letter to the local board from petitioner advising that

he received a notice to report and that he had appealed to the National Director to review his case and requesting the board to stay induction (Defendant's Exhibit 27); a telegram to the National Director from petitioner (Defendant's Exhibit 28); and a letter from the State Director to the local board transmitting a copy of the telegram and returning Clayton's said letter (Defendant's Exhibit 29, 113), were all excluded from the evidence.

The report of the physical examination showing that petitioner was listed as a minister of religion performing ministerial duties (Defendant's Exhibit 32, 119-120); and a letter from the State Director to petitioner advising that no appeal would be taken (Defendant's Exhibit 38, 125).

The trial court excluded testimony of the Government's witness, Marlin E. Hilty, showing that the above documentary evidence was the entire file of petitioner and that the local board and appeal board did not consider any other evidence than Exhibits 1 to 40 in arriving at the classification and in considering his claim for exemption as a minister. (130-133)

The trial court also excluded the testimony of the father of petitioner, W. S. Clayton, concerning the schooling and training of the petitioner as a minister of the gospel and corroborative evidence in support of his activity and occupation being exclusively that of a minister of religion since 1938 (145-146), and that petitioner stood in relation to Jehovah's witnesses as do ministers of orthodox religious denominations and was qualified to perform various ceremonies. (147) Similar evidence was offered through the testimony of A. K. Robinette and excluded (148-150), and through the testimony of Carl H. Hibshman, also excluded. (151-153)

Petitioner was denied the right to testify that as a minister of the gospel he had been designated and authorized to establish, serve and minister unto congregations (156); that he had gone into several different localities and established many congregations (157-158); how and when he was

ordained and for what purpose (158); the details of his ordination ceremony (159); that he possessed and had issued to him credentials of ordination (159); that he preached to the people that God's government to be established in the earth after the Battle of Armageddon will rule the earth in righteousness and bless all obedient subjects with peace, prosperity, happiness and everlasting life and that he relied upon the same scriptural authority for his preaching and ordination as did Christ Jesus when on earth (160-161); that if he discontinued his preaching he would suffer everlasting destruction at the hand of Almighty God and prove himself to be a covenant breaker which covenant requires him to remain neutral as to worldly conflicts so that he might continue comforting the people of good-will toward God (161-162); that he filed an application with the *Watchtower Society* to be appointed an evangelist and that the Society investigated him and found that he possessed the necessary qualifications (162); that if the people were interested and did not have time to attend his congregation he would carry the message to them at their homes by conducting home Bible studies (163-166), and that he performed ceremonies and rendered services of a nature substantially the same as those performed by ministers of orthodox religions and stood in the same relation to his congregations as do ministers of said recognized religions (166-167). The court also denied petitioner the right to testify as to what took place at the hearing tending to prove that the board did not regard the evidence, the regulations or the Opinion No. 14 (170-174); evidence that petitioner could not report for induction and go through the induction ceremony and become a part of the armed forces without violating his conscience and his covenant with Jehovah God (177); and based upon all the evidence he submitted to the local board he believed that the order to report was invalid and that he had the right to show that same was void as affecting him (189-190).

Upon the trial it was called to the court's attention that

all of the foregoing documentary evidence and testimony which was excluded was offered for the purpose of showing that the draft boards had deprived petitioner of his rights and liberty without due process of law contrary to the Fifth Amendment, that the board had acted arbitrarily and capriciously, contrary to the evidence, without evidence, in excess of its authority and jurisdiction, and contrary to the Selective Training and Service Act and the Regulations thereunder (59-62, 138, 160, 175, 19-22, 148, 167).

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and seriously affect the life, liberty and rights of many thousands of persons who are exempt from all training and service under the Selective Training and Service Act.

These questions are not foreclosed by the decision of this court in the case of *Falbo* v. *United States,* 320 U. S. 549. The question of whether the statute and regulations are bills of attainder and pains and penalties was urged for the first time to this court on the *Falbo* motion for rehearing. It is assumed that this question was rejected by the court because raised too late under the doctrine of this court announced in *Steines* v. *Franklin County,* 14 Wall. 15; *Fullerton* v. *Texas,* 196 U. S. 192; and *Godchaux* v. *Estopinal,* 251 U. S. 179.

On this petition there are presented questions not considered by this court in the *Falbo* case because not urged. The opinion in the *Falbo* case states that there was no attack upon the parts of the Act and Regulations which require one to comply with the orders of the board. Here there is a direct attack upon both on the grounds that a judicial trial of a judicial question is denied contrary to specific provisions of the Constitution prohibiting such conclusions as expressed in the *Falbo* opinion by this court. The opinion and decision of this court in *Falbo* v. *United States* is declared by Mr. Justice Black to be limited to a very fine

point. He said: "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process."

Here there are presented questions which go deeper than a challenge to the mere "propriety of a board's classification" but the court is called upon to consider whether or not the Selective Service System violated the rights and liberty of the petitioner contrary to the due process clause of the Fifth Amendment and the specific provisions of the Act and Regulations. The specific provisions of the Constitution compel the permission of judicial review of the administrative action and determination.

The action of the district court in refusing to charge the jury that they could consider, in determining whether the petitioner was guilty of willfully, knowingly and feloniously failing to perform a duty imposed upon him under the Act and Regulations, that the petitioner honestly and in good faith believed that he was exempt under the Act and Regulations for duty of training and service because a minister of religion, constituted a decision on an important question of federal procedure in conflict with the applicable decision of this court in *United States* v. *Murdock*, 290 U. S. 389, 395-396.[10]

The construction placed upon the Act and Regulations so as to require an exempt registrant to comply with all illegal orders of the administrative agency as a condition precedent to obtain judicial review and to deny the petitioner the right to judicial review of the unconstitutional action of the agency because he refused to comply with the illegal order is a decision on "a federal question in a way probably in conflict with applicable decisions of this court"

[10] Although this point was not briefed below it was raised by the bill of exceptions, appendix, and called to the attention of the court below upon the oral argument and to the district court by requested instructions Nos. 37, 37A, 37B and 38, Ap. C. pp. 43-45.

so as to justify the granting of the writ of certiorari to review the judgment in this case. The *applicable decisions* of this court on the question of whether the construction placed upon the Act and Regulations violates the Constitution are set forth below.

Applicable decisions of this court holding the construction placed upon the statute to be bills of attainder and of pains and penalties are: *Fletcher* v. *Peck,* 6 Cranch 137; *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333. Compulsion of an exempt person to undergo induction is the same as a test oath condemned in these cases. Denial of the right to an inquiry as to illegality of the order of the board is denial of a judicial trial; and the above cases hold that the denial of a judicial trial by statute is a bill of attainder. If these decisions above cited are not "applicable" within the meaning of Rule 38, Par. 5 (b) of the Rules of this Court, then petitioner asserts that the court below has decided a federal question "which has not been, but should be, settled by this court" and that the circuit court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision" by construing the Act and Regulations so as to convert them into bills of attainder and of pains and penalties contrary to Clause 3, Section 9 of Article I of the United States Constitution.

The Act and Regulations require the petitioner to surrender himself and his civilian rights as a condition to obtain judicial review and if he does not he is conclusively presumed to be guilty of having violated a duty under the Act; and in defense to the indictment cannot show that he had no duty under the Act. This type of law and device for conviction so as to deprive an accused of his defense of no duty under the law and thus show he is not guilty is identical in terms and principles with the condemned English bills of attainder and of pains and penalties which required the person named therein to surrender himself to the king

to be dealt with according to his discretion. If he failed to report at the time and place fixed he was prosecuted as a violator of his duty, which was defined as treason. Upon the trial his guilt or violation of a duty was conclusively presumed by virtue of his failure to report at the time and place named in the bill. At the trial the accused was allowed trial by jury and the right to have counsel; but the questions to be determined at the trial were whether the accused was the person named in the bill and whether he reported at the time and place fixed. As in the case at bar the accused was denied the right to show that he had violated no duty. A research of history and the law proves that the similarity brings the construction placed upon the law within the condemnation of the bill of attainder provisions of the Constitution. Wooddeson, *A Systematical View of the Laws of England* (1777), pp. 621-648; *The Catholic Encyclopedia,* Vol. II, p. 59; *Encyclopædia Britannica* (1942 ed.) Vol. 2, p. 656; Cooley, *Constitutional Limitations,* 8th ed., Vol. 1, pp. 536-539; Story's *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216; *Cummings* v. *Missouri,* 4 Wall. 277; *Haines* v. *Buford* (Kentucky), 1 Dana 510; *Kentucky* v. *Jones,* 10 Bush (70 Ky.) 725; *In re Yung Sing Hee* (Circuit Court, Oregon), 36 F. 437 (1888); *Davis* v. *Berry,* 216 F. 413; and Watson's *The Constitution of the United States* (Callaghan & Co., 1910), Vol. 1, pp. 736-737.

The failure of Congress to provide for judicial review of an illegal order of an administrative agency upon which the indictment is based is a direct violation of the due process clause of the Fifth Amendment. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 456-457; *St. Louis & San Francisco Ry.* v. *Gill,* 156 U. S. 649, 666; *Ex parte Young,* 209 U. S. 123, 147; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Dayton Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 486; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 351-352; *Bogardus* v. *Commissioner of Internal Revenue,* 302 U. S. 34; and *Consolidated Edison*

Co. v. *National Labor Relations Board,* 305 U. S. 197.

To require one to report for induction who is exempt from duty under the Act and to surrender his civilian rights and undergo the certainty of extreme punishment for failure to comply with regulations of the armed forces as a condition to obtain judicial review by writ of habeas corpus is to impose such severe penalties as to deny judicial review of an illegal order altogether and constitutes a violation of the due process clause of the Fifth Amendment. *Ex parte Young,* 209 U. S. 123, 147; *Missouri Pac. R. Co.* v. *Nebraska,* 217 U. S. 196, 207-208; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 53; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 660-663; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331.

The Act and Regulations thereunder have been construed so as to permit the trial courts in prosecutions under the Act to strike all defenses raised under the plea of not guilty, deny the right of the defendant to be heard as to his innocence, permit conviction upon an ex parte order of the administrative agency, dispense with the requirement that the accused be confronted with witnesses against him as to his violation of a duty, and deny the right of cross examination because of the contempt of the administrative agency shown by the petitioner in failing to comply with the illegal order of the administrative agency, which construction violates the rights of the accused in criminal cases guaranteed by the Fifth and Sixth Amendments to the United States Constitution. *McVeigh* v. *United States,* 11 Wall. 259, 267; *Windsor* v. *McVeigh,* 93 U. S. 274; *Dowdell* v. *United States,* 221 U. S. 325, 330; *Edwards* v. *United States,* 312 U. S. 473; *United States* v. *Stevenson,* 215 U. S. 190, 199; *Rogers* v. *Peck,* 199 U. S. 425; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Wong Wing* v. *United States,* 163 U. S. 228; *Hovey* v. *Elliott,* 167 U. S. 409, 413-418; *Panama Ref'g Co.* v. *Ryan,* 293 U. S. 388; and *Tot* v. *United States,* 319 U. S. 463, 473. Compare *Chambers* v. *Florida,* 309 U. S. 227, 236-241; *People* v. *McCoy,* 125 Ill.

289, 17 N. E. 786; *People* v. *Kaye,* 212 N. Y. 407, 416; *State* v. *Weimer,* 64 Iowa 243; *State* v. *Kirby,* 120 Iowa 26; *Crane* v. *State,* 5 Okla. Cr. 560; and *Richter* v. *State,* 16 Wyo. 437.

There is no showing made, nor could it be reasonably claimed, that the permitting of the making of the defense of exemption from duty constitutes a real, substantial, and immediate danger that the raising of an army and navy or the safe prosecution of the war will certainly result from allowing the petitioner to make his defense to the indictment. Since the rights expressly guaranteed by the specific provisions of the Constitution cannot be denied or abridged in the absence of a showing of a clear and present danger of real and substantial injury to some interest of the state (*Schenck* v. *United States,* 249 U. S. 47, 52; *Bridges* v. *California,* 314 U. S. 252; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640), the right to a judicial review of the illegal order in defense to the indictment cannot be denied. The total number of exempt persons under the Act, including those claiming ministerial classification, constitute such a small proportion of the registrants as to dispel any claim of clear and present danger. Read, in this connection, the clear and forceful reasoning of Mr. Justice Murphy in his dissenting opinion in the case of *Falbo* v. *United States,* 320 U. S. 549.

The holding of the court below is in conflict with applicable decisions of this court holding that the defense of reasonable restraint of trade must be permitted in answer to an indictment prosecuted under the Anti-Trust Law. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 189.

The argument that there is no constitutional exemption from military duty does not add weight to the factitious conclusion that the petitioner is not entitled to a judicial review in response to the indictment. The right to judicial review of administrative action has never been conditioned upon such a finding. Practical considerations are not adequate to support the denial of due process in criminal cases.

Chambers v. *Florida,* 309 U. S. 227, 236-238, 240-241.

The holding of the court below that there must be a compliance with the administrative order is in conflict with applicable decisions of this court holding that such orders need not be complied with because they did not contemplate an administrative hearing. *Utley* v. *St. Petersburg,* 292 U. S. 106; *Lane* v. *Wilson,* 307 U. S. 268; *Railr'd & W. Comm'n of Minn.* v. *Duluth St. R. Co.,* 273 U. S. 625; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557; and *Gonzales* v. *Williams,* 192 U. S. 1. In the latter case it was held that if, as in the case at bar, the contention is that the administrative agency had no jurisdiction or exceeded its authority in taking action it was not necessary to comply with the order or exhaust administrative remedies as a condition precedent to judicial review.

The holding of the court below that the order cannot be attacked because not complied with is in conflict with applicable decisions of this court holding that if the executive agency invokes the judicial process to enforce its fiats the proceedings become sufficiently severed from the administrative process to command judicial review in spite of the fact that the administrative process has not been completed. *Cobbledick* v. *United States,* 309 U. S. 323; *In re Burrus,* 136 U. S. 586; *Ex parte Fisk,* 113 U. S. 713, 718; and *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16.

The holding of the court below that petitioner cannot attack an illegal order because of failing to comply with it is in conflict with applicable decisions holding that there is need for judicial review under circumstances identical to those involved here. Want of jurisdiction can be determined without compliance with orders. *Wise* v. *Withers,* 3 Cranch 331; *Crowell* v. *Benson,* 285 U. S. 22, 54, 63; *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; *Kessler* v. *Strecker,* 307 U. S. 22, 34-35; *Burfenning* v. *Chicago St. P. R. Co.,* 163 U. S. 322, 323; *United States* v. *Idaho,* 298 U. S. 105, 109-110; *City of Yonkers* v. *United States,* 320 U. S. —, No. 109 October Term 1943. If it is asserted that the ad-

ministrative agency has violated due process of law in its proceedings or determination there must be judicial review. *Crowell* v. *Benson,* 285 U. S. 22, 56-57; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 50-52; *St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S. 649; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349. If the order is claimed to be unsupported by substantial evidence and the result of arbitrary and capricious action of the agency there must be judicial review. *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318; *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103. The charge of bias and prejudice on the part of the administrative agency and the denial of a hearing by refusal to give consideration commands judicial review. *Humphrey* v. *United States,* 295 U. S. 602, 624; *Morgan* v. *United States,* 298 U. S. 468, 479-481; 304 U. S. 1, 14-25; and *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91.

Petitioner here challenges the correctness of the decision of this court in the case of *Falbo* v. *United States,* 320 U. S. 549, and insofar as it may be argued to control any of the questions here presented the court is requested to reconsider the doctrine announced in that decision because it is completely out of harmony with and in conflict with the Constitution and prior decisions of this court.

Petitioner asserts that upon many of the questions presented the courts below have decided an important question of federal law which is not in accord with applicable decisions of this court. On other questions the courts below have decided important questions of federal law and constitutional law which have not been, but should be, settled by this court. It is also claimed that upon all these questions presented the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. It is submitted that this case is one call for the

exercise of this court's supervisory powers under the statute and rules of this court.

The Cause Is Not Moot

It is submitted that the Circuit Court of Appeals was correct in overruling the Government's motion to dismiss the appeal and in holding that the release of petitioner pending the appeal did not make moot the questions presented. This issue is fully discussed in the supporting brief filed separately and in the opinion of the Circuit Court of Appeals which is printed as an appendix to this petition to which petitioner here refers for further argument against the suggestion of the Government that this petition should be dismissed because moot. Before any such technical rule denying a person the right to review a conviction for a felony which attaints him throughout his life and continuously denies him certain of his valuable rights of citizenship this court should fully review the principles involved, allow full argument, and fully discuss the reasons supporting the doctrine advanced by the Government.

SUPPORTING BRIEF

Upon the question of mootness urged upon the court by the motion of the Government in the court below and also upon each of the questions presented upon this petition for writ of certiorari an argument is made by petitioner in his supporting brief. The supporting brief usually printed as a part of the petition for writ of certiorari has been prepared, printed and filed separately. The court is referred to said separate brief filed herein and requested to consider the same as a part of this petition and with this petition before deciding whether the writ should be granted. It is submitted that grave and substantial questions are presented which need a determination by this court after full argument by counsel in open court; and to this end the petition for writ of certiorari as hereinafter prayed for should be granted.

WHEREFORE your petitioner prays that this court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

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